



The Comptroller General  
of the United States

Washington, D.C. 20548

Kozinn - PL

## Decision

Matter of: Dictaphone Corporation

File: B-228241

Date: December 23, 1987

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### DIGEST

1. Where protester failed to demonstrate that its product conformed with the salient characteristics of the brand name product specified in the request for quotations, protester's offered equipment properly was rejected as unacceptable by agency.
2. Protest that specifications for dictating system unduly restrict competition must be filed before the closing date for receipt of quotations.
3. Award will not be disturbed where approval required under agency regulations to deviate from standard specifications in a request for quotations (RFQ) was not obtained prior to issuance of the RFQ, but deviation was approved after award, since protester was not prejudiced by approving official's ratification of the contracting officer's actions after award.

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### DECISION

Dictaphone Corporation protests the issuance of delivery order No. 549-7A0479 to Harris Lanier by the Veterans Administration Medical Center in Dallas, Texas. The order is for a digital dictation system to be used by Veterans Administration (VA) physicians and was placed under Lanier's mandatory, multiple-award Federal Supply Schedule (FSS) contract.<sup>1/</sup> Dictaphone complains that the delivery order was awarded to a higher priced schedule contractor absent a sufficient justification for doing so in violation of the applicable procurement regulations.

We deny the protest.

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<sup>1/</sup> FSC Group 74 Section I Section A, FSC Classes 5340, 7430 and 7450.

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Before placing the delivery order, the VA issued request for quotations (RFQ) No. 549-125-87 to Harris Lanier and Dictaphone, the two FSS vendors that could furnish digital dictating systems, for a "Lanier Voicewriter System 1-16 Ports, 19 hours or equal" and supplemental equipment. The RFQ listed several salient characteristics (entitled "Additional Specifications") that the equal product had to meet. Although Dictaphone submitted a lower priced quote, the VA determined that the Dictaphone system could not meet three of the salient characteristics concerning the inter-com, verbal insertion and non-distorted speed control features present in the Lanier system, and that the purchase of the Lanier product was justified.

Federal agencies must procure from a multiple-award FSS at the lowest price consistent with their minimum needs. American Sterilizer Co., B-212933, Jan. 26, 1984, 84-1 CPD ¶ 122. It is well settled that the determination as to which offered products meet those needs is primarily within the jurisdiction of the procuring agency, and the General Accounting Office will not interfere unless the determination is shown to be unreasonable. NJCT Corp., B-220132, Nov. 26, 1985, 85-2 CPD ¶ 605.

We cannot find that the VA's determination regarding the unacceptability of Dictaphone's offered product was unreasonable. When a solicitation sets forth salient characteristics of the brand name product under a brand name or equal solicitation, those features are presumed to be material and essential to the government's needs and thus conformance is mandatory. Western Graphtec, Inc., B-216948, B-217353, Apr. 2, 1985, 85-1 CPD ¶ 381; Castle/Division of Sybron Corp., B-219056, Aug. 7, 1985, 85-2 CPD ¶ 142. Although Dictaphone asserts that its equipment meets, "in substance," the salient characteristics of the RFQ, the protester has offered no evidence to support its position. The RFQ set forth in very specific terms the design features that the equal product had to meet, and since on this record it appears that Dictaphone's product did not conform to the salient characteristics in the RFQ, the VA properly did not find the Dictaphone equipment to be acceptable. See Endure-A-Lifetime Products, Inc., B-219529.2, Oct. 11, 1985, 85-2 CPD ¶ 404. We therefore deny Dictaphone's protest of the VA's rejection of its quotation.

Dictaphone also asserts that its system meets the requirements set forth in VA Standard Specification X-1710B and that the VA should have issued the RFQ based solely on that standard specification. The protester claims that the VA has no special needs that justify the additional specifications in the RFQ and that "these specifications were created for the apparent purpose of favoring an award to Lanier."

To the extent Dictaphone complains that the specifications were excessive of the agency's needs or unduly restrictive, the protest is untimely. Our Bid Protest Regulations require that a protest of solicitation improprieties apparent prior to the closing date for the receipt of quotations be filed prior to the time for closing. 4 C.F.R. § 21.2(a)(1) (1987); Cryogenic Consultants, Inc., B-225520, Mar. 4, 1987, 87-1 CPD ¶ 249. The closing date was August 25, 1987; however, the protest was not filed until September 22, 1987.

In any event, we note that the agency report supports the need for the three additional features Dictaphone could not meet. According to the VA, the intercom requirement permits the physicians to reach the transcription supervisor to ask questions concerning the system's operation without using the overburdened telephone lines. The verbal insertion feature permits the physician to insert dictation without recording over previously dictated material avoiding the need for physicians to redo the dictation or issue an addendum to a report. Finally, non-distorted speed control allows transcriptionists to slow down dictation in order to better understand physicians who often dictate rapidly or have foreign accents. Dictaphone does not rebut the VA's justification for these features. The agency concludes that these solicited features will promote more effective use of the dictating equipment by the VA physicians and more efficient and accurate transcribing of that dictation. The protester has not persuasively rebutted the agency's justification for requiring these features.

Furthermore, we find no evidence in the record, other than Dictaphone's bare allegations, that the agency drafted the additional specifications, or otherwise conducted the procurement, in a manner that favored Lanier. As indicated above, the record shows that the additional features solicited reflect the agency's minimum needs. The protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Cryogenic Consultants, Inc., B-225520, supra. We find that Dictaphone has not met its burden.

Dictaphone next contends that the contracting officer failed to obtain the appropriate approval to deviate from VA Standard Specification X-1710B for central dictating systems and thus issued the solicitation and awarded the contract in violation of procurement regulations.

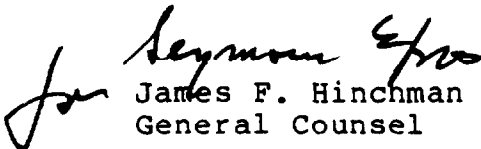
The protester raises this issue for the first time in its written comments of November 12, 1987 and does not indicate when it first learned of this alleged procedural defect. It is the protester's contention that the VA failed to comply with the VA Acquisition Regulation, 48 C.F.R. § 810.006(c)(2) (1986), which requires the contracting officer to request, prior to taking any procurement action, authority to deviate from a standard specification from the Director, Office of Procurement and Supply and to obtain such approval in writing. Dictaphone alleges that the contracting officer's failure to obtain the appropriate approval improperly has allowed the procuring activity to tailor specifications to one bidder and thus restrict competition.

The VA explains that the regulation was designed as an internal control to "enable the VA to achieve at all levels the best balance between equipment assets and equipment needs," and that the regulation was designed for the benefit of the government. It asserts that the failure to obtain the approval prior to issuance of the RFQ is procedural and does not affect the validity of the procurement. It further points out that the deviation was approved retroactively.

In this case, it appears that the contracting officer relied upon the advice and assistance of the user activity in formulating the RFQ specifications in accordance with the agency's needs. There is no suggestion that the contracting officer intentionally sought to violate the VA Acquisition Regulation. Moreover, it is clear from the record that the appropriate official has in fact ratified the contracting officer's determination that a deviation from the standard specification was essential to the VA activity's operations. The Director, Office of Procurement and Supply subsequently approved the deviation from the standard specification in his signed support of the agency's report submitted to our Office on October 19, 1987.

We find no basis to disturb the award under these circumstances, since the necessary approval ultimately was obtained and the protester was not prejudiced by the approving official's ratification of the contracting officer's actions after award since it is clear the specification deviations reflect the agency's legitimate needs.

Accordingly, we deny the protest.

  
James F. Hinchman  
General Counsel